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Telekom Malaysia Bhd v Eastcoast Technique (M) Sdn Bhd and another summons

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24NCC(ARB)-43–12 OF 2013 AND 24NCC(ARB)-1–01 OF 2014
NALLINI PATHMANATHAN J
29 MAY 2014

Arbitration — Award — Error of law — Arbitrator found certain clauses in agreements between disputing parties void for undue influence and other parts of agreements to be valid — Arbitrator also found one party to be in breach of agreements and awarded damages to 'innocent' party without proof of damages — Whether several conclusions by arbitrator made without evidentiary basis and constituted serious errors of law — Whether High Court entitled under s 42 of the Arbitration Act 2005 to set aside arbitral award

Telekom Malaysia Bhd ('Telekom') and Eastcoast Technique (M) Sdn Bhd ('Eastcoast') entered into an agreement for Telekom to buy surge arrestors manufactured and supplied by Eastcoast. Clauses both in the principal and, thereafter, five supplementary agreements between the parties clearly stated that Telekom was not bound to buy the entire quantity of surge arrestors Eastcoast produced and that it had absolute discretion in so far as the quantity to be purchased was concerned ('the impugned clauses'). Some years after the contracts between the parties had been fully performed Eastcoast contended that the impugned clauses were legally void as they were unconscionable terms obtained through the exercise of undue influence and were against public policy. Eastcoast referred the matter to arbitration. The arbitrator concluded that Eastcoast had established that undue influence had taken place (no finding was made with regard to public policy) as Eastcoast was a bumiputra company operating under an EDP programme to assist bumiputras and was at the mercy of the government-linked Telekom in respect of bargaining power in relation to the agreements. Concluding that Telekom had obtained an unfair advantage over Eastcoast in the agreements, the arbitrator found the impugned clauses to be void by reason of undue influence under s 16 of the Contracts Act 1950 ('the Act'). However, he ruled that the rest of provisions in the agreements were valid. Although no proof of actual loss was adduced by Eastcoast at the hearing, the arbitrator awarded it loss of profits at 15% on the remaining contract value of those surge arrestors that Telekom did not purchase, opining that that was a reasonable figure in the circumstances. The instant application by Telekom sought to refer three questions of law to the court under s 42 of the Arbitration Act 2005 ('the AA') with a view to setting aside the arbitral award or having the same remitted back to the arbitrator. Telekom challenged the arbitrator's finding that it had exercised undue influence and had breached the agreements.

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It also contended the award of damages to Eastcoast was made without basis. On the other hand, Eastcoast, dissatisfied with the arbitrator's dismissal of three other heads of damages it had claimed, sought by a separate application to have the matter remitted back to the arbitrator for the damages to be properly estimated in accordance with s 74 of the Act. Alternatively, it wanted the court to vary the quantum.

Held, allowing Telekom's application and setting aside the arbitral award:

(1) There was absolutely no evidence to support the arbitrator's bare finding that Eastcoast had shown that specific terms in the agreements had been obtained by undue influence. The fact that Eastcoast was a bumiputra company under the EDP programme and Telekom was a government-linked company did not in itself warrant the conclusion in law that undue influence had been established. There was no evidence of any dominance of will to enable the principles of law relating to undue influence to apply (see para 40(a)–(b)).

(2) The arbitrator erred in law in imposing a burden upon Telekom under s 16(3) of the Act to prove there was no undue influence. This was an incorrect application of s 16(3). He also erred in law in concluding that only specific clauses in the six agreements were rendered void by undue influence while the rest of the agreements remained intact and binding. If there was undue influence it would necessarily affect the entirety of the contract rendering the same wholly void (see para 40(c)–(d)).

(3) Telekom was not in breach of the agreements and the arbitrator's finding that it was in breach was a further error of law. Even with regard to the damages awarded, the arbitrator failed to apply the principles of law relating to damages, namely s 74 of the Act, and the need for the party seeking the damages to establish its entitlement to same by clear proof. Although he acknowledged that no documents were tendered by Eastcoast in support of the claim for loss of profit the arbitrator nevertheless awarded 15% as a 'reasonable sum' (see paras 40(e) & 42).

[Bahasa Malaysia summary

Telekom Malaysia dan Eastcoast Technique (M) Sdn Bhd ('Eastcoast') telah memasuki satu perjanjian agar Telekom membeli 'surge arrestors'; yang dikilangkan dan dibekalkan oleh Eastcoast. Klausa-klausa dalam kedua-dua prinsipal dan, terkemudian, lima perjanjian tambahan antara pihak-pihak jelas menyatakan bahawa Telekom tidak terikat untuk membeli kesemua kuantiti 'surge arrestors' yang dihasilkan Eastcoast dan bahawa ia mempunyai budi bicara penuh dalam mana melibatkan kuantiti yang dibeli ('klausa-klausa yang dipertikaikan'). Beberapa tahun selepas kontrak-kontrak antara pihak-pihak telah dijalankan sepenuhnya, Eastcoast menghujahkan bahawa klausa-klausa yang dipertikaikan adalah terbatal secara sah kerana dikatakan bahawa terma

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yang diperolehi daripada menjalankan pengaruh tidak wajar dan bertentangan dengan polisi awam. Eastcoast merujuk perkara tersebut kepada timbang tara. Timbang tara memutuskan bahawa Eastcoast telah membuktikan berlakunya pengaruh tidak wajar (tiada dapatan dibuat mengenai polisi awam) kerana Eastcoast adalah syarikat bumiputra yang beroperasi di bawah program EDP untuk membantu bumiputra dan bergantung pada belas ihsan Telekom yang berkaitan dengan kerajaan bagi kuasa tawar-menawar berkenaan perjanjian-perjanjian. Memutuskan bahawa Telekom telah mendapatkan kelebihan tidak adil ke atas Eastcoast dalam perjanjian-perjanjian, timbang tara memutuskan bahawa klausa-klausa yang dipertikaikan adalah batal atas sebab pengaruh tidak wajar di bawah s 16 Akta Kontrak 1950 ('Akta'). Walau bagaimanapun, beliau memutuskan bahawa peruntukan selebihnya dalam perjanjian-perjanjian adalah sah. Walaupun tiada bukti kehilangan sebenar yang dikemukakan oleh Eastcoast semasa perbicaraan, penimbang tara mengawardkan kerugian sebanyak 15% ke atas nilai kontrak selebihnya bagi 'surge arrestors' tersebut yang tidak dibeli oleh Telekom, dengan pendapat bahawa ia adalah satu jumlah yang munasabah berdasarkan hal keadaan. Dalam permohonan oleh Telekom ini untuk merujuk tiga persoalan undang-undang kepada mahkamah di bawah s 42 Akta Timbang Tara 2005 ('ATT') dengan pandangan untuk mengenepikan award timbang tara atau mengembalikan yang sama kepada timbang tara. Telekom mencabar dapatan penimbang tara bahawa ia telah menjalankan pengaruh tidak wajar dan melanggar perjanjian-perjanjian tersebut. Ia juga menghujahkan bahawa award ganti rugi kepada Eastcoast dibuat tanpa sebab. Sebaliknya, Eastcoast tidak berpuas hati dengan penolakan penimbang tara bagi tiga perkara ganti rugi yang dituntutnya, memohon dalam permohonan berasingan untuk mengembalikan hal perkara tersebut kepada penimbang tara bagi ganti rugi ditaksir dengan betul selaras dengan s 74 Akta. Secara alternatifnya, ia memohon mahkamah untuk memvariasikan kuantum.

Diputuskan, membenarkan permohonan Telekom dan mengenepikan award timbang tara:

(1) Tiada keterangan sekali pun untuk menyokong dapatan penimbang tara semata-mata bahawa Eastcoast telah menunjukkan bahawa terma-terma spesifik dalam perjanjian telah diperolehi melalui pengaruh tidak wajar. Fakta bahawa Eastcoast adalah syarikat bumiputra di bawah program EDP dan bahawa Telekom adalah syarikat berkaitan kerajaan tidak mewajarkan keputusan dalam undang-undang bahawa pengaruh tidak wajar telah dibuktikan. Tiada keterangan dominasi niat untuk membolehkan prinsip undang-undang berkenaan pengaruh tidak wajar terpakai (lihat perenggan 40(a)–(b)).

(2) Penimbang tara khilaf dalam undang-undang dalam mengenakan beban ke atas Telekom di bawah s 16(3) Akta untuk membuktikan pengaruh tidak wajar. Ini adalah permohonan s 16(3) yang salah. Beliau juga khilaf

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dalam undang-undang dalam memutuskan bahawa klausa-klausa spesifik dalam enam perjanjian dikatakan batal akibat pengaruh tidak wajar sedangkan perjanjian-perjanjian lain kekal dan mengikat. Jika terdapat pengaruh tidak wajar, ia akan memberi kesan kepada keseluruhan kontrak, menjadikannya batal sepenuhnya (lihat perenggan 40(c)–(d)).

(3) Telekom tidak melakukan pelanggaran ke atas perjanjian-perjanjian dan dapatan penimbang tara bahawa ia melakukan pelanggaran adalah kekhilafan undang-undang. Berkenaan ganti rugi yang diawardkan, penimbang tara gagal mengguna pakai prinsip-prinsip undang-undang berkenaan ganti rugi, khasnya s 74 Akta, dan keperluan agar pihak-pihak memohon ganti rugi untuk membuktikan haknya ke atas yang sama dengan bukti yang jelas. Walaupun beliau mengakui kerugian, penimbang tara walau bagaimanapun mengawardkan 15% sebagai 'jumlah munasabah' (lihat perenggan 40(e) & 42).]

Notes

For cases on error of law, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1767–1769.

Cases referred to

Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd [2014] 1 AMR 253, HC (refd)
Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis [1983] 2 All ER 658, QBD (folld)

Legislation referred to

Arbitration Act 2005 ss 8, 42, 42(1A), (4)
Contracts Act 1950 ss 16, 16(3), 74

N Chandran (V Vijaykumar and Sabrina Leon with him) (Albar & Partners) for the plaintiff.
Mohd Zawahid Ya (Zawahid & Co) for the defendant.

Nallini Pathmanathan J:

[1] The two applications above were heard together. Vide 24NCC (ARB)-43–2 of 2013 the plaintiff there, namely Telekom Malaysia Bhd seeks to refer three questions of law under s 42 of the Arbitration Act 2005, seeking either a setting aside of the arbitration award dated 22 November 2013 ('the award') or a remission of the same.

[2] Vide 24NCC (ARB)-1–01 of 2014, the plaintiff there, namely Eastcoast Technique (M) Sdn Bhd seeks an order that the award, ie the same arbitration award dated 22 November 2013 be remitted for the reconsideration of the

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learned arbitrator, or alternatively for this court to vary the award for proper damages to be paid to Eastcoast Technique (M) Sdn Bhd.

[3] Both Eastcoast Techinque (M) Sdn Bhd and Telekom Malaysia Bhd make their respective applications under s 42 of the Arbitration Act 2005 only.

[4] As these two applications are heard and disposed of in the course of the same hearing, the parties will be referred to by their respective names, ie Eastcoast Technique (M) Sdn Bhd and Telekom Malaysia Bhd rather than the plaintiff and defendant or the claimant and respondent (as they were before the arbitrator).

THE SALIENT BACKGROUND FACTS

[5] The background facts have been set out in the award as well as the submissions of counsel for both Telekom and Eastcoast. I adopt and summarise the salient facts as follows:

(a) Telekom and Eastcoast entered into an agreement pursuant to which Eastcoast covenanted to manufacture and supply equipment, namely surge arrestors to Telekom. A letter of offer dated 9 November 1996 was initially issued by Telekom to Eastcoast, after which a formal contract was entered into between the parties on 2 December 1997 ('principal agreement').

[6] Item 4.1 of the letter of offer states in clear terms that the quantity of surge arrestors as set out in the annex to the letter of offer comprise an estimated quantity and that Telekom is not bound to place an order for the full estimated quantity.

[7] The principal agreement went through a series of renewals, primarily to extend the duration of the contractual arrangement between the parties. Such renewals are evidenced by five supplementary agreements. These five supplementary agreements carry the same contract number as the principal agreement. The principal agreement therefore sets out the governing terms and conditions which are applicable to the five supplementary agreements.

[8] The primary clause in dispute between the parties to the arbitration was cl 9 which relates to the quantity of surge arrestors to be supplied by Eastcoast to Telekom. It provides as follows:

> Clause 9
>
> The quantities of the items stated in the Agreement are estimates of Telekom Malaysia's requirements. Telekom Malaysia shall not be bound to purchase the aforesaid estimated quantities and shall not be liable for any costs incurred by the

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Entrepreneur to meet such estimated requirements. Telekom Malaysia reserves the right to amend the quantities of items ordered.

[9] Subsequently in the supplementary agreement No 1 cl 9 above was replaced by a new cl 6 of the said agreement which states as follows:

Purchase of the items shall entirely be at Telekom Malaysia's sole discretion. Telekom Malaysia shall not be obliged to purchase up to the full value of the original contract during the changing of Contract Quantity.

[10] The learned arbitrator found that cl 6 of the supplementary agreement No 1 had replaced cl 9 of the principal agreement.

[11] It is relevant to note notwithstanding the following that the essence of the annex to the letter of offer, cl 9 of the principal agreement and cl 6 of the supplementary agreement No 1 all expressly preserved Telekom's discretion in so far as the purchase quantity of the items under the respective agreements (and supplementary agreements) were concerned. In other words, Telekom reserved the right and discretion not to be bound to purchase the entirety of the 'estimated' number of surge arrestors spelt out in these various agreements from time to time.

[12] The very use of the word 'estimated' in itself indicates that there was no absolute certainty that Telekom would require the entire number of surge arrestors estimated to be required in the various agreements. To this end Telekom reserved the right not to purchase such entirety. Clause 6 goes on to specify expressly that Telekom was not obliged to purchase up to the full value of the original contract when the contract quantity had altered.

[13] In all the supplementary contracts, save primarily for the alterations in contract quantities which differed, all other terms and conditions remained the same and were expressly stated to be valid and binding. In other words the variations to the quantity (and on one occasion the price) did not serve to alter the primary or binding terms of the original principal agreement.

[14] The principal agreement and the supplementary agreements were fully performed. However Telekom did not purchase the entirety of the surge arrestors estimated to be required in these agreements.

(a) with regards to the principal agreement, Telekom purchased 90% of the estimated quantity;

(b) with regards to the supplementary agreement, Telekom purchased 95% of the estimated quantity;

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(c) with regards to the supplementary agreements Nos 2 and 3, the respondent purchased 44.03% of the estimated quantity;

(d) with regards to the supplementary agreement No 4, the respondent purchased 51.17% of the estimated quantity; and

(e) with regards to the supplementary agreement No 5, the respondent purchased 52.36% of the estimated quantity.

[15] Notwithstanding the full performance of these contracts over a period of 15 years, some years later Eastcoast contended that Telekom had failed to meet its legitimate expectations of ordering or purchasing surge arrestors in quantities equivalent to the numbers set out in the 'estimated quantities' clause. Eastcoast therefore referred the matter to arbitration.

[16] In essence, in the arbitration proceedings, Eastcoast contended that the various clauses in the principal and supplementary agreements that provided that Telekom was under no obligation to purchase the full estimated quantities, was void in law and of no legal effect on the following grounds, namely:

(a) comprising unconscionable terms;

(b) the said respective terms were obtained by undue influence; and

(c) the said respective terms to that effect were against public policy.

[17] In the award the learned arbitrator concluded that Eastcoast had succeeded in establishing undue influence. This is what he found:

> " ... The claimant was able to show in evidence that the terms were obtained by undue influence.
>
> Having found that there were sufficient evidence to show that the terms were obtained by undue influence, I need not make any finding as to whether the term was against public policy. Suffice for me to add that this agreement was pursuant to a EDP programme to promote Bumiputra Entrepreneurs and as parties were continuously entering into Supplementary Agreement, there existed a relationship whereby the respondent being a public listed GLC and the claimant being a Company under the EDP programme, the respondent has a duty towards such companies to promote Bumiputra entrepreneur ...

[18] The learned arbitrator then went on to consider excerpts from *Sinnadurai's Law of Contract* (4th Ed), in relation to s 16 of the Contracts Act 1950 and the requirement for the existence of a special relationship between the parties for a presumption of undue influence to arise. The learned author went on to state that in the case of actual undue influence there is no requirement for any type of relationship to exist between the parties. All that had to be established was that one party had exercised such domination over the mind and will of the other, that the transaction was brought about.

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[19] The learned arbitrator then went on to find as follows:

> Hence I find that the claimant being a company under the EDP programme is at the mercy of the respondent in respect of any bargaining power. In the circumstances the respondent (ie Telekom) had obtained an unfair advantage.

[20] After quoting further from *Sinnadurai's Law of Contract* the learned arbitrator concluded that in order to establish undue influence:

> ... it is necessary to establish two matters:
>
> (i) that one party was in a position to dominate the will of the other; and
>
> (ii) that party used that position to obtain an unfair advantage over the other.

[21] After further discussion he found that Telekom had failed to discharge the burden imposed on it under s 16(3) of the Contracts Act 1950. The learned arbitrator concluded as follows:

> ln the circumstances, it is my considered opinion that Clause 9 under the Principal Agreement, Clause 6 under the Supplementary Agreement No 1 and Supplementary Agreement 2 and Clause 11 under the Supplementary Agreement 4 are void and the rest of the Clauses in both the Principal Agreement and Supplementary Agreements are valid pursuant to section 20 of the Contracts Act 1950.

[22] The upshot is that he found each of the clauses which expressly provided that Telekom was not bound nor obliged to purchase the full estimated quantities stipulated in each of these contracts, to be void by reason of undue influence under s 16 of the Contracts Act 1950. However he went on to hold that the entirety of the rest of the transaction remained valid and subsisting.

[23] The learned arbitrator then went on to consider the issue of damages. Four heads or items were claimed. He dismissed three of the four items and only allowed the item on loss of profit of 15% or RM1.16 per unit of surge arrestor. This is the finding of the learned arbitrator in this regard:

> During cross-examination, it was put that this figure was plucked from the air and this was denied. Though no documents have been tendered on the costs of raw materials, for manufactured products, I find that 15% profit is a reasonable sum bearing in mind the costs of materials and labour.
>
> Since the claimant is claiming only 15% of RM4,647,200.00 out of the balance not purchased, I hereby award the said loss of profit on the remaining contract value as claimed which works out to RM697,380.00.

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[24] It is this latter finding on damages where all other items were dismissed that comprises the primary grievance of Eastcoast in 24NCC(ARB)-1/1 of 2014 . Eastcoast seeks to have the matter remitted for reconsideration for a proper estimation of damages in accordance with s 74 of the Contracts Act 1950 or alternatively for this court to vary the said damages.

THE RESPECTIVE QUESTIONS OF LAW PUT FORWARD BY THE PARTIES

[25] Vide 24NCC(ARB)-43–12 of 2013 ('Telekom's Suit') where Telekom Malaysia Bhd is the plaintiff and Eastcoast Technique (M) Sdn Bhd is the defendant, Telekom Malaysia Bhd has posed no less than 15 lengthy questions for the consideration of the court under s 42 of the Arbitration Act 2005. I do not propose to set them out here in the entirety. It suffices for me to summarise that in essence Telekom Malaysia challenges the findings of the learned arbitrator in relation to the finding of undue influence. Telekom also challenges the arbitrator's finding that it was in breach of the agreement/s with Eastcoast. Finally the damages awarded are also challenged on the grounds simply that there was no evidence produced to prove such loss of profit.

[26] It is however, necessary to undertake the task of determining which of the plaintiff's series of 15 questions comprise questions of law in relation to the foregoing issues.

QUESTIONS OF LAW IN RELATION TO UNDUE INFLUENCE

[27] It appears to the court that questions (vi) and (viii) in Telekom's originating summons in the Telekom suit encapsulate the heart of the challenge relating to the finding of undue influence by the learned arbitrator. I set out these two questions below for ease of reference:

> (vi) Whether the finding of the arbitrator that, there is a proven case of undue influence by the defendant as against the plaintiff, warranting the damages as awarded by him, in the circumstances and on the peculiar facts of the matter, including the express terms of the principal agreement and the supplementary agreements, is bad, both on the facts and in law for the reason that it offends the entrenched principle of Malaysian Contract Law that parties to a contract are at full liberty to contract on terms and conditions as freely agreed to by them and on which terms the parties have conducted their affairs related to the contracts entered into by them?
>
> (viii) Whether, on the peculiar facts of the matter herein which were before the arbitrator, the principal agreement and the supplementary agreements can be said to be agreements induced by 'undue influence', within the meaning of the term 'undue influence' under s 16 of the Contracts Act 1950 and thereby be held to impugn the provisions of the said section?

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QUESTIONS OF LAW IN RELATION TO THE AWARD OF DAMAGES

[28] Questions (xiii) and (xiv) in Telekom's originating summons in its suit set out the relevant questions of law for consideration under s 42:

> (xiii) Whether, on the facts and in the circumstances of the case, the finding of the arbitrator leading to his award for the alleged claim for loss of profit in the sum of RM697,380, despite his express acknowledgement that the defendant had not tendered any documents in proof thereof, is a decision which is correct in law and a decision in line with the well entrenched principle that a claim for a monetary sum, as damages, must be proven to the hilt by the party claiming?
>
> (xiv) Whether, the arbitrator's award for loss of profit with full acknowledgement by him that no documentary evidence in support thereof had been tendered by the defendant/claimant, is an award clearly flowing from the evidence introduced or supplemented by the arbitrator on his own volition and with no proof led by the defendant, thereby rendering that part of the award of the arbitrator, perverse?

QUESTIONS OF LAW RELATING TO DAMAGES POSED BY EASTCOAST

[29] Vide 24NCC(ARB)-1/1 of 2014 ('Eastcoast's Suit') where Eastcoast Technique (M) Sdn Bhd is the plaintiff and Telekom Malaysia Bhd is the defendant, the following questions of law are posed for the consideration of the court under s 42 of the Arbitration Act 2005:

(a) whether damages payable by the party who breaches the contract covers all losses incurred by the innocent party which naturally arose in the usual course of things;

(b) upon finding of liability, whether the defendant is liable for the four items claimed including costs; and

(c) whether damages is not payable merely due to the subjective opinion of the arbitrator that payment of damages is not fair to the party who committed the breach although those losses naturally arose in the usual course of things from the breach and is therefore payable under s 74 of the Contracts Act 1950.

[30] It is evident from a perusal of these questions that Telekom's questions of law relate to liability and only then damages, while Eastcoast's questions of law relate to the award of damages only.

[31] It therefore follows that if this court agrees with Telekom that there are questions of law which arise from the award in relation to the issue of liability which warrant either remission of the award or the setting aside of the award, then it would not be necessary to consider the issues relating to damages. The questions of law relating to damages would only arise necessarily if the court

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confirms the arbitrator's findings in relation to liability, more particularly in relation to the finding of undue influence.

[32] I therefore proceed to consider Telekom's questions of law as set out above, in relation to liability. This in essence centres around the learned arbitrator's finding of undue influence, rendering only specific clauses in the principal agreement and five supplementary agreements void, while retaining the rest of the substratum of these agreements. Contingent upon the finding of undue influence is the result reached by the arbitrator, namely that Telekom was in breach of the six agreements in failing to purchase the full estimated quantities.

TELEKOM'S CASE ON LIABILITY

[33] As stated before, Eastcoast's complaint was that Telekom had failed to purchase the 'full estimated value' of the quantities of surge arrestors as specified in the various agreements. Telekom's answer was that the quantity to be purchased as specifically set out in the various agreements were only estimates. Moreover there were express reservations by way of provision in the various contracts providing that Telekom was neither obliged nor bound to purchase the full 'estimated' quantities specified in those agreements. As such Telekom maintains that by reason of the terms of the various agreements it was not obliged to purchase the full estimated quantity.

[34] I have set out above the learned arbitrator's response to Eastcoast's complaint, whereby it was held that those clauses which strove to confer upon Telekom any sort of discretion as to the quantities of surge arrestors ordered, were void for undue influence under s 16 of the Contracts Act 1950.

[35] Telekom contends that the learned arbitrator erred in determining the foregoing issue which impinges directly on liability.

THE LAW IN RELATION TO S 42 OF THE ARBITRATION ACT 2005

[36] The issue before this court exercising its powers under s 42 is whether or not the court should intervene to provide any one of the remedies set out in that section in the event an error of law as envisaged by the section is established. The section prescribes that this court may intervene in relation to any question of law that substantially affects the rights of one or more of the parties (s 42(1A)).

[37] Does the finding of the learned arbitrator that clauses conferring a discretion on Telekom in relation to the quantity of surge arrestors to be purchased is void, or in other words clauses which exempt Telekom from

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purchasing the full estimated quantity specified in the various contracts are void, comprise a question of law warranting the intervention and consideration of this court?

[38] I have examined this issue at some length in the case of *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2014] 1 AMR 253. I do not propose to restate the law which I considered in some depth in that case. Suffice to say that I rely entirely on the reasoning there to adopt the test proffered by Mustill J in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* in determining whether an error of law as envisaged under s 42 arises. I set out below the salient section of my decision relating to the test in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis*:

> ... 17. Mustill J then goes on to consider the proper test or approach to be adopted by a court determining the substantive appeal which turns on a question of law arising out of the arbitration:
>
> > ... Starting therefore with the proposition that the court is concerned to decide on the hearing of the appeal whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages: (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.
> >
> > In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
> >
> > Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated.
> >
> > Whether stage (3) can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 and *Kodros Shipping Corporation v Empresa Cubana de Fletes (No*

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2) [1983] 1 AC 736, show that where the Issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award.

[39] The foregoing to my mind succinctly and comprehensively sets out the test to be adopted by a court in applying s 42.

APPLICATION OF S 42 TO THE QUESTIONS OF LAW POSED BY TELEKOM IN RELATION TO LIABILITY, IE THE FINDING OF UNDUE INFLUENCE AND THEREBY, BREACH OF CONTRACT

[40] I have set out in the material background facts the specific findings of the learned arbitrator in relation to undue influence. A perusal of the award, more particularly at p 12 to the first half of p 17 makes it clear that:

(a) the learned arbitrator made a bare finding or conclusion that Eastcoast had been able to show in evidence that specific terms in the six agreements were obtained by undue influence. However there is absolutely no evidence to support this bare finding. In other words, the conclusion appears to be arrived at with absolutely no evidence to support it;

(b) while correctly citing the law relating to undue influence from *Sinnadurai's Law of Contract*, there was no application or nor proper application of such law to the factual matrix of the case. Again after citing the law correctly, the learned arbitrator simply made a conclusion that as Eastcoast was a bumiputra company operating under a programme to assist bumiputras, it was 'at the mercy' of Telekom 'in respect of any bargaining power'. This, to my mind amounts to an erroneous application of the law to the bare facts of the identity of Eastcoast and Telekom. Put another way, the fact that Eastcoast is a bumiputra company under the EDP programme and Telekom is a government linked company does not in itself warrant a conclusion law that undue influence is thereby established. This, as stated in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis*, amounts to an error of law because the learned arbitrator, while stating the law correctly has misapplied the same or misunderstood the law. If the learned arbitrator had applied the law correctly the only answer he could plausibly have arrived at would have been that undue influence did not arise as a

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consequence of the relationship between the parties. Neither was there any evidence of dominance of will to enable an application of the principles of law relating to undue influence;

(c) given my conclusions above, the learned arbitrator also erred in law in imposing a burden upon Telekom under s 16(3) to prove that there was no undue influence. Again this is an incorrect application of s 16(3) of the Contracts Act 1950 which amounts to an error of law;

(d) finally, the learned arbitrator concluded that only specific clauses in the six agreements were rendered 'void' by undue influence. This again comprises an error of law because it is entirely untenable to conclude that only specific clauses in an agreement are affected by undue influence while the rest of the agreement remains intact and binding. A plea of undue influence must necessarily affect the entirety of the contract rendering the same void. To conclude otherwise would lead to absurdity. Therefore the learned arbitrator's conclusion that only specific terms in the various contracts were rendered void, while the rest of the contract subsisted is, with respect, erroneous. This therefore amounts to another error of law warranting the intervention of this court under s 42 of the Arbitration Act 2005.

It must be said that the High Court is very slow, and indeed reluctant to intervene in arbitration awards. The cases in which the court exercises its powers of intervention are expressly restricted as provided by s 8 of the Act. As such it is oniy in rare cases that the court will intervene in an arbitration award. But as set out in the test in relation to s 42 above, a clear error of law or misapplication of the law to the fact, as in the instant case warrants a rectification of the law. This is also a case where the rights of one of the parties, ie Telekom has been substantially affected. But of utmost importance is the need to ensure that the law in relation to undue influence remains intact and is correctly applied.

This then is one of the rare cases where the court is constrained to exercise its powers to correct the clear errors of law arising. It must be emphasised that this court has not sought to interfere nor invoke its discretion in relation to any questions of fact. It is clear in my mind that the questions I have set out above are questions of law and not questions of fact masquerading as questions of law.

It follows from my conclusions above that there was no basis for the finding of undue influence. As such there was no question of specific terms being rendered void in the various agreements between the parties. It follows that if the specific terms singled out by the learned arbitrator are not in fact, void, that these clauses then continued to have effect throughout the course of the agreements. It must be borne in mind that all the agreements were fully performed over the course of no less than 15 years with no complaint by Eastcoast. No attempt at

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termination for breach was ever made. Eastcoast only raised its grievance about undue influence in relation to the quantities of surge arrestors purchased by Telekom after full performance of these agreements; and

(e) therefore the conclusion of the learned arbitrator that Telekom was in breach of the agreements is also flawed and amounts to an error of law as it is once again an incorrect application of the law to the factual matrix. A correct application of the law to the facts would have given rise to the only answer available on the facts of this case, namely that there was no breach by Telekom. This amounts to a stage error in the test set out in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis* by Mustill J.

[41] Given my conclusions above it is evident that this court is constrained to exercise its powers under s 42 which I hereby do. I exercise my powers under s 42(4) to set aside the award in its entirety for the reasons set out above.

[42] Finally in relation to the issue of damages which is also the subject matter of Eastcoast's challenge in its suit. Again it is apparent from a reading of the arbitration award that the learned arbitrator failed to apply the principles of law relating to damages namely s 74 as well as the need for a party seeking damages to establish its entitlement to the same by clear and sound proof of such damages. In the instant case, while acknowledging that no documents were tendered in relation to the essential elements required to compute loss of profit, the learned arbitrator nonetheless concluded, seemingly with no evidential basis whatsoever, that 15% appeared to be a 'reasonable' sum to be awarded to Eastcoast. The foregoing amounts to an error of law in relation to the assessment of damages in terms of the principles of law relating to damages. There was moreover no application whatsoever of the correct principles of law to the factual matrix. Additionally there was no evidence whatsoever to support the learned arbitrator's finding in relation to damages. As such these comprise clear instances of a failure under stage (2) of an arbitrator's process of reasoning. In other words, these matters also comprise an error of law.

[43] In the entirety of the circumstances as set out above Telekom's application under s 42 in its suit is thereby allowed. Applying s 42(4) of the Arbitration Act 2005, the award is set aside in its entirety.

[44] With respect to Eastcoast's Suit, while the questions of law posed there also give rise to errors of law, and to that extent ought to be allowed, it follows from the foregoing that as the issue of liability has been set aside, the issue of damages does not arise.

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[45] The costs of these applications are to be borne by Eastcoast in the sum of RM10,000. A

Telekom's application allowed and arbitral award set aside.

Reported by Ashok Kumar B

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